

In the Matter of Jose Santana

CSC Docket No. 2009-2165

OAL Docket No. CSV 477-09

(Civil Service Commission, decided July 13, 2011)

The appeal of Jose Santana, a Painter at Stockton State College, of his 10-day suspension on charges, was heard by Administrative Law Judge Bruce M. Gorman (ALJ), who rendered his initial decision on July 16, 2010, reversing the 10-day suspension. Exceptions were filed by on behalf of the appointing authority and cross exceptions were filed on behalf of the appellant.

Having considered the record and the ALJ's initial decision, and having made an independent evaluation of the record, the Civil Service Commission (Commission), at its meeting on July 13, 2011, accepted and adopted the Findings of Fact as contained in the attached initial decision but did not adopt the ALJ's recommendation to reverse the 10-day suspension. Rather, the Commission upheld the 10-day suspension.

DISCUSSION

Procedural History

On December 10, 2008, the appellant filed an appeal of his 10-day suspension on charges of conduct unbecoming a public employee and insubordination. Specifically, it was alleged that the appellant acted in an inappropriate manner in an interaction with his supervisor, Charles Jackson, on March 28, 2008. Upon receipt of his appeal, the matter was transmitted to the Office of Administrative Law (OAL) for a hearing as a contested case. On December 24, 2008, IFPTE Local 195, on behalf of the appellant, filed an unfair practice charge with the Public Employment Relations Commission (PERC) arguing that the appellant's suspension was in retaliation for his role as union president.

At OAL, motions to consolidate the matters and to determine which agency had the predominant interest were filed by both parties. On October 5, 2009, the ALJ issued an order of consolidation and predominant interest regarding these matters. In that order, the ALJ stated that the matters would be consolidated and that PERC had the predominant interest over the issues regarding the unfair practice charge. The order also indicated that after making a determination on that issue, PERC would transmit the matter to the Commission to allow it to determine whether the discipline was warranted. A Joint Order was subsequently issued by the Commission and PERC essentially adopting the ALJ's order.

On July 16, 2010, the ALJ issued an initial decision. Regarding the disciplinary charges, the ALJ dismissed the insubordination charge, finding that the appellant did not disregard Jackson's order or act in disobedience of Jackson. Regarding the charge of conduct unbecoming a public employee, the ALJ found the following:

Santana acted in an aggressive and adversarial manner towards his superior. He addressed Jackson disrespectfully and used profanity. Were this a simple case of an employee confronting his boss, there is no question that Santana's conduct would fall into the category of "not in accord with propriety, modesty, good taste or good manners, or behavior that is otherwise unsuitable, indecorous, or improper." The charge of unbecoming conduct would be sustained, and the ten day suspension upheld.

But the case before me does not involve a simple clash between an employee and his supervisor. Santana was a union official. If he was acting in his capacity as a union official when he confronted Jackson, then a different set of standards applies. *Initial decision* at 11-12.

The ALJ then determined that the appellant was engaged in protected union activity at the time of the altercation, and also determined that Jackson's complaint which led to the disciplinary charges was filed in retaliation against the appellant for exercising his protected union activities. In this regard, the ALJ stated:

I **FIND** Jackson's testimony on this issue to be incredible and unbelievable. I am satisfied that Jackson's complaint was motivated by one overriding factor: Santana, and through him the union, had challenged his action in hiring his daughter's boyfriend (later his son-in-law). Jackson was engaged in a blatant act of nepotism. His complaint against Santana was the direct and proximate result of his anger that the union would challenge his right to engage in such nepotism. Jackson demonstrated his hostility during his testimony on the stand. Jackson was intent on forestalling the union's efforts to protest the hiring of his prospective son-in-law. He filed his complaint against Santana for that purpose. *Initial decision* at 15.

Based on this finding, the ALJ concluded that the union had sustained its claim of an unfair labor practice and, therefore, he dismissed the disciplinary charges. In this regard, the ALJ indicated that:

Santana's conduct as a union official can hardly be deemed exemplary. I **FIND** his testimony that he never became excited, remained calm, and did not use profanity to be incredible and unbelievable

Unquestionably, Santana lost emotional control. But nothing in statements attributed to him would appear to rise to a level taking it outside the scope of protected speech. Santana's worst comments related to Jackson's prospective son-in-law, who he believed to be incompetent and involved with drugs. Were these comments strictly an attack on Jackson's family, they might be deemed outside the scope of what is permissible. But given that Jackson's son-in-law was the primary subject to the labor dispute, Santana's concerns, however inarticulately and emotionally expressed, cannot be said to be irrelevant to the labor relations process

* * *

Without question, Santana could have used more temperate language when he confronted Jackson. His loss of emotional control was hardly the best way for him to represent his constituents. But however inartfully he expressed himself, there can be no question that Santana was acting as a union official when he spoke on March 28, 2008. Under the circumstances of the case, I must necessarily find that his speech was protected.

Given that Santana's speech was protected, the charge of unbecoming conduct must fail. However indecorous Santana's statements may have been, he was engaged in protected speech in his capacity as a union official. *Initial decision* at 15-16.

The ALJ forwarded the matter to PERC to allow it to render its final administrative determination.

In its May 26, 2011 final decision, PERC affirmed the ALJ's initial decision sustaining the unfair practice charge¹ and finding that Santana was engaged in protected union activity at the time of the incident. PERC then forwarded the matter to the Commission to allow it to consider the disciplinary charges.

¹ PERC rejected the portion of the ALJ's initial decision which found that the appointing authority violated the section of the Employer-Employee Relations Act pertaining to negotiating in good faith regarding terms and conditions of employment, finding no evidence of such a violation.

In its exceptions as they pertain to the Commission's portion of the matter, the appointing authority contends that the ALJ erred in not considering the testimony that the appellant engaged in inappropriate conduct immediately after his altercation with Jackson when he, as the ALJ indicated, "vented in a highly agitated fashion" to two other supervisors.

In response, the cross exceptions indicate that the ALJ correctly analyzed the case law and credible evidence in the record in finding that the appellant was engaged in protected activity.

Determination

Upon an independent review of the entire record, while the Commission has no authority to dispute the ALJ's findings, as affirmed by PERC, that the appellant was engaged in protected union activity at the time of the incident with his supervisor, it disagrees with the ALJ's conclusion that the disciplinary charge of conduct unbecoming a public employee must be dismissed. Rather, the Commission upholds that charge. It is clear that the appellant's action in attempting to discuss a work-related issue in his capacity as a union official was protected. However, it is equally clear that an individual advocating as a representative of a union does not have unfettered rein in his or her actions by virtue of that status and still must adhere to standards of conduct appropriate to the time, place and context of those actions. In other words, acting in the capacity of a union representative does not automatically immunize an employee from discipline. *See e.g., In the Matter of George Glover* (MSB, decided May 8, 2001). The ALJ found that neither the appellant nor Jackson offered credible testimony regarding the altercation between them. Rather, the ALJ found credible the account of an eyewitness, Gregory Hauser. Hauser testified that:

He was seated at the computer, situated between Jackson and Santana. Santana asked Jackson who the temps would be. According to Hauser, Jackson said, "It's none of your f-ing business." Santana continued to ask the same question, and Jackson gave him the same answer. Finally, Santana said, you better not bring in your son-in-law. Jackson continued to assert that the question was none of Santana's business. Santana then called the son-in-law a bum. He stated he was tired of working with drunks and drug addicts and losers. Jackson then called Santana an asshole, whereupon Santana called Jackson an asshole.

Hauser listened carefully to who offered the first curse word. He was emphatic that Jackson used profanity first. According to Hauser, once Jackson used profanity, it was acceptable practice for Santana to

use profanity. He stated that the use of profanity within the all male setting of the paint shop was not unusual. *Initial decision* at 7-8.

While the ALJ is correct that union representatives are given significant latitude in how they are permitted to speak and act when interacting with management, the appellant's conduct in this case was outside the boundaries permitted and constituted unprotected unbecoming conduct. Specifically, the appellant's direct and personal attack on Jackson's future son-in-law was wholly inappropriate. There is no circumstance where such potentially slanderous statements (*i.e.*, accusing an individual of being a "drunk" or a "drug addict"²) can be considered appropriate, regardless of whether the overall context of the discussion is a topic that is legitimately discussed by a union representative with management. Accordingly, the Commission finds the appellant guilty of conduct unbecoming a public employee solely for those actions.

Additionally, the Commission rejects the exceptions filed by the appointing authority as unpersuasive. Initially, it is unclear whether the appointing authority is arguing that the ALJ should have considered the testimony regarding the appellant's alleged subsequent "outbursts" as evidence that his interaction with Jackson went beyond his acting in a union capacity; or, whether it is contending that the appellant was charged with such conduct, and based on the testimony, should be found guilty for those alleged actions. Regardless, neither reason has merit. In the first instance, there is nothing in the record to support that the appellant's subsequent actions prove that his interaction with Jackson, other than the attack on Jackson's son-in-law, constituted unprotected activity. The fact that the appellant may have subsequently "vented in a highly agitated fashion" to two other supervisors does not bear on whether his interactions towards Jackson constituted protected activity. In the second instance, and after a close and thorough review of the entire record, the Commission can find no specifications in the Preliminary or Final Notices of Disciplinary Action specifically charging the appellant with misconduct for any alleged actions other than those with Jackson. As no disciplinary charges were brought on those notices for those alleged actions, they cannot be considered. *See Hammond v. Monmouth County Sheriff's Department*, 317 N.J. Super. 199 (App. Div. 1999); *Lamont Walker v. Burlington County*, Docket No. A-3485-00T3 (App. Div. October 9, 2002); *In the Matter of Charles Motley* (MSB, decided February 25, 2004) (It is well established that the ALJ and the Commission only have jurisdiction to adjudicate disciplinary charges and specifications which were sustained at the departmental level hearing).

² While the ALJ did not find Jackson's testimony, that the appellant more specifically called Jackson's future son-in-law a "crack head," "drug pusher," and "marijuana smoker" credible, Hauser's testimony at least lends some support that such accusations could have been levied by the appellant. This is especially true, given the appellant's incredible testimony that he did not, in any way, as the ALJ summarized, "attack Jackson's son-in-law as a drug addict."

Penalty

In determining the proper penalty, the Commission's review is *de novo*. In addition to considering the seriousness of the underlying incident in determining the proper penalty, the Commission utilizes, when appropriate, the concept of progressive discipline. *West New York v. Bock*, 38 N.J. 500 (1962). Further, it is well established that where the underlying conduct is of an egregious nature, the imposition of a penalty up to and including removal is appropriate, regardless of an individual's disciplinary history. *See Henry v. Rahway State Prison*, 81 N.J. 571 (1980). It is settled that the principle of progressive discipline is not a "fixed and immutable rule to be followed without question." Rather, it is recognized that some disciplinary infractions are so serious that removal is appropriate notwithstanding a largely unblemished prior record. *See Carter v. Bordentown*, 191 N.J. 474 (2007).

In this case, the appellant's prior disciplinary history consists of an official written reprimand for violating the sick leave policy in 2002 and a one-day suspension for insubordination in 2002 since his employment in 1995. In this matter, the appellant's conduct, while initially within bounds for his tenacious advocacy as a union official, was clearly inappropriate when he went beyond the realm of what is acceptable while pursuing such advocacy. Accordingly, in light of the appellant's prior disciplinary history and based on the nature of his misconduct, the Commission finds the 10-day suspension originally imposed by the appointing authority neither unreasonable nor disproportionate to the offense.

ORDER

The Commission finds that the action of the appointing authority in imposing a 10-day suspension on the appellant was justified. Therefore, the Commission upholds that penalty and dismisses the appellant's appeal.

This is the final administrative determination in this matter. Any further review should be pursued in a judicial forum.